No. 80-1702

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN B. NICOSIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was improperly denied a jury instruction on the defense of entrapment.

1. Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of obstructing justice by endeavoring to influence the testimony of a grand jury witness, in violation of 18 U.S.C. 1503.[1] He was sentenced to 18 months' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. 1-21).

The evidence at trial showed that petitioner was mayor of East Chicago, Indiana, from January 1964 through December 1971. As mayor, petitioner appointed Cornel Leahu to

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[1]Petitioner was acquitted on one count of filing a false income tax return (26 U.S.C. 7206) and on one count of making a false statement at a prior trial (18 U.S.C. 1623).

be Superintendent of the East Chicago Sanitary District. During petitioner's second four-year term in office, the city began a large public works project under the direction of the Sanitary District (Pet. App. 5). The project contractor obtained the contract by paying kickbacks to petitioner and other city officials. Pursuant to a spring 1969 meeting in the basement of petitioner's home and subsequent conversations between petitioner and Alfred Kovach, his former executive assistant, petitioner directed the other participants to "handle" the kickback funds through Kovach (*ibid.*; Tr. 998, 1317-1319). The money was channeled through a sham Swiss corporation and back to the contractor, who ultimately paid one million dollars to Leahu, who in turn delivered it to Kovach. Kovach then delivered the money to petitioner (Pet. App. 5).

The scheme eventually was discovered, and Leahu and Kovach were summoned to testify before a federal grand jury. They both lied, testifying that the money had been given to someone other than petitioner. After Leahu and Kovach were convicted for their roles in the scheme,[2] they were again subpoenaed by the grand jury, and this time they cooperated with the government. Kovach appeared first and testified that petitioner had received the money (Pet. App. 5-6). Kovach subsequently told Leahu that he had testified truthfully about the payments (Tr. 2112). Leahu testified under a grant of immunity before the same grand jury on June 9, 1977 (Pet. App. 6).

On June 10, 1977, and again on July 7, 1977, Leahu met with petitioner. On both occasions Leahu wore a concealed microphone and tape recorder. At the outset of the June 10 meeting, Leahu told petitioner that he had been subpoenaed by the grand jury and that Kovach already had

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[2]See *United States* v. *Fitzgerald*, 579 F. 2d 1014 (7th Cir.), cert. denied, 439 U.S. 1002 (1978).

testified and had changed his story. Petitioner urged Leahu to stand by his earlier story that petitioner had not received the money. He directed Leahu to testify that he could not recall the spring 1969 meeting in petitioner's basement or driving Kovach to petitioner's home to deliver the money. Petitioner also discussed the applicable statutes of limitations and warned Leahu to be very careful about the dates he told the grand jury that he received payments. Petitioner repeatedly urged Leahu to tell the grand jury that petitioner knew nothing about the kickback scheme (Pet. App. 6).

At the July 7 meeting, Leahu told petitioner that he had met with the prosecutor and investigators, who knew specific details of petitioner's participation in the scheme (Tr. 2126-2127). Petitioner advised Leahu to say that he could not recall any of the events (Pet. App. 6, 8 n.1). When Leahu pointed out that he could remember, petitioner told him that nothing could be done if Leahu maintained his asserted loss of memory (*ibid.*; Tr. 2137, 2140-2142, 2147, 2152).

Petitioner testified at trial and identified his voice on the tape recordings, but denied attempting to influence Leahu (Pet. App. 6). The district court refused petitioner's request to instruct the jury on the defense of entrapment. The court first relied on the Seventh Circuit's rule (see *United States* v. *Johnston*, 426 F. 2d 112, 114 (1970)) that a defendant must admit the acts of the alleged offense in order to be entitled to an entrapment instruction, but in a post-trial ruling the court held that in any event there was no evidence of entrapment (Pet. 5; Pet. App. 7, 9; C.A.R. 128 at 7-9).[3]

A majority of the court of appeals panel agreed that there was no evidence that the government had induced petitioner to obstruct justice. Hence, it held there was no need to reconsider *United States* v. *Johnston*, *supra*, because,

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[3]"C.A.R." refers to the record in the court of appeals, identified by document number and the relevant pages of it.

regardless of the continued vitality of that decision, the district court properly had refused to give the requested entrapment instruction (Pet. App. 1-15). Judge Swygert dissented. In his view, there was sufficient evidence to raise the entrapment issue, and the court should have reconsidered *United States* v. *Johnston, supra,* and overruled it.[4]

2. Petitioner contends (Pet. 6) that the record shows that there was "some evidence of government initiation of the offense," thus requiring an entrapment instruction. Both courts below, however, rejected this fact-based contention, and there is no reason for further review of it. *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

While a defendant is not required to testify at trial in order to present a colorable entrapment claim, the record must nevertheless contain some evidence from which the jury could find either inducement or persuasion on the part of the government, or unwillingness on the defendant's part, to commit the crime. See *United States* v. *Buckley,* 586 F. 2d 498, 501 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979); *United States* v. *Christopher,* 488 F. 2d 849, 850-851 (9th Cir. 1973); *United States* v. *DeVore,* 423 F. 2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971); *Kadis* v. *United States,* 373 F. 2d 370, 374 (1st Cir. 1967). Contrary to petitioner's claim that this requirement was satisfied, however, both the district court and the court of appeals majority found that it was petitioner " 'who initiated the obstruction of justice' " (Pet. App. 9). Indeed, the tapes showed that petitioner urged Leahu to adhere to

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[4]The dissent describes (Pet. App. 15) the district court's decision as resting on *United States* v. *Johnston, supra.* The dissent ignores, however, the district court's post-trial ruling that there was an insufficient evidentiary basis upon which to submit the entrapment issue to the jury (C.A.R. 128 at 7-9).

his previous story and that petitioner initiated the discussion about the statutes of limitations, advising Leahu to push back the dates on which he told the grand jury he had received payments (Pet. App. 6; Tr. 2104-2106, 2115, 2119, 2121-2122). Their second meeting was in a similar vein. When Leahu told petitioner that investigators knew of the spring 1969 meeting in the basement of petitioner's home, petitioner immediately and repeatedly directed Leahu to answer "I don't recall" to questions relating to that incident, despite Leahu's protests that he did remember and could not respond in that manner to every question (Pet. App. 8 n.1; Tr. 2127-2129, 2136-2138, 2140-2142, 2147-2148, 2152, 2159-2160, 2162-2163).

As the court of appeals recognized, "Leahu simply did not induce [petitioner] to a criminal act which he lacked predisposition to commit" (Pet. App. 9). Leahu merely provided petitioner with the opportunity to commit the offense, but that is not entrapment. See *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932); *United States* v. *Perry*, 478 F. 2d 1276, 1278 (7th Cir.), cert. denied, 414 U.S. 1005 (1973); *United States* v. *DeVore, supra*, 423 F. 2d at 1072. In sum, because there was no evidence that the government "actually implant[ed] the criminal design in the mind of the defendant" (*United States* v. *Russell*, 411 U.S. 423, 436 (1973)), petitioner was not entitled to an entrapment instruction. *United States* v. *Buckley, supra*, 586 F. 2d at 501-502; *United States* v. *Brooks*, 567 F. 2d 134, 138 (D.C. Cir. 1977); *United States* v. *Glassel*, 488 F. 2d 143, 146 (9th Cir. 1973), cert. denied, 416 U.S. 941 (1974); *United States* v. *DeVore, supra*, 423 F. 2d at 1072; see *Lopez* v. *United States*, 373 U.S. 427, 436 (1963).[5]

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[5]Nor, contrary to petitioner's claim (Pet. 6), did the court of appeals or the district court impermissibly weigh the evidence in the record against his entrapment claim. Rather, the court of appeals merely fulfilled its obligation—like that of the trial court—to determine

3. For the same reason, the present case is not an appropriate vehicle in which to consider the asserted conflict between *United States* v. *Johnston, supra,* and the decisions of some of the other circuits. To be sure, some courts of appeals have disagreed with *Johnston's* holding that a defendant must admit commission of the offense charged before he is entitled to an entrapment instruction. See, *e.g., United States* v. *Demma,* 523 F. 2d 981 (9th Cir. 1975) (en banc); *Hansford* v. *United States,* 303 F. 2d 219, 221 (D.C. Cir. 1962) (en banc). Nonetheless, those courts adhere to the requirement that a defendant must make the traditional threshold showing discussed above before he is entitled to an entrapment instruction. See, *e.g., United States* v. *Brooks,* 567 F. 2d 134, 138 (D.C. Cir. 1977); *United States* v. *Glaeser,* 550 F. 2d 483, 486 (9th Cir. 1977); *United States* v. *Demma, supra,* 523 F. 2d at 984 n.4. Because, as both courts below found, there was no evidence of entrapment here, petitioner would not be entitled to an entrapment instruction even in those circuits that do not require a defendant to admit commission of the offense. Accordingly, this case presents no occasion to consider the propriety of the *Johnston* rule.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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whether petitioner had satisfied his burden of showing some evidence of inducement by the government and lack of predisposition on his part. *United States* v. *Glaeser,* 550 F. 2d 483, 487 (9th Cir. 1977); *United States* v. *Glassel, supra,* 488 F. 2d at 146. Neither the court of appeals nor the district court weighed the evidence; instead, they determined that there was *no* evidence tending to support an entrapment defense (see Pet. App. 7, 9).